

State of Vermont
Public Service Board
112 State Street, Drawer 20
Montpelier, VT 05620-2701

Re: CG Docket No. 04-208

Dear Chairman Michael Powell;
Commissioner Kathleen Abernathy;
Commissioner Michael Copps;
Commissioner Kevin Martin; and
Commissioner Jonathan Adelstein:

We are writing because NARUC's General Counsel has informed us that, in response to a filing from NASUCA, the Commission may be circulating an order that redefines "rates" for commercial mobile services to include regulatory line items and other surcharges, and that preempts states, pursuant to Section 332(c)(3), from prohibiting or otherwise regulating the inclusion of these line items on customer bills. We are not certain of the extent of the impending preemption, particularly regarding state rules on inclusion of separate charges and on the form of those charges.

Federal preemption of wireless billing layouts is contrary to the intent of Congress and is likely to conflict needlessly with state taxation powers. It would also undermine a pending rulemaking regarding operation of the Vermont Universal Service Fund.

As we understand the scope of the possible preemption, it appears to be inconsistent with the intent of Section 332(c)(3). The plain language of Section 332 reserves state authority over terms and conditions, while proscribing only state regulation of entry and rates.

Legislative history shows that Congress intended to reserve state authority over the presentation of line items and surcharges. The House of Representatives Committee on Energy and Commerce, reporting on the House bill that was incorporated into the amended Section 332, noted that even where state rate regulation is preempted, states nonetheless may regulate other terms and conditions of commercial mobile radio services:

By "terms and conditions," the Committee intends to include such matters as *customer billing information and practices* and billing disputes and other consumer protection matters; facilities siting issues (e.g., zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."¹

It is difficult to understand how the definition of "rates" could be expanded to include "terms and conditions" without contradicting the clear legislative intent behind Section 332.

If the Commission does preempt, it may also be at great risk of intruding impermissibly into the reserved taxation powers of the states. This problem could potentially arise in three ways in Vermont.

First, Vermont imposes a telecommunications sales tax. It is imposed on all intrastate and interstate telecommunications services.¹ Vermont Statutes Annotated specifically control how the sales tax is presented on the customer's bill:

§ 9778. Collection of tax from purchaser

Every person required to collect the tax shall collect the tax from the purchaser when collecting the price or amusement charge to which it applies. If the purchaser is given any sales slip, invoice, receipt or other statement or memorandum of the price, or amusement charge paid or payable, *the tax shall be stated, charged and shown separately on the first of the documents given to him.* The tax shall be paid to the person required to collect it as trustee for and on account of the state.¹

1. H.R. Rep. No. 111, 103 Cong., 1st Sess. 2 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 588 (italics added).

2. 23 V.S.A. §§ 9771(5), 9701(19).

3. 32 V.S.A. § 9778 (italics added).

Second, Vermont operates a state universal service fund that was also established by act of the Vermont General Assembly. The VUSF operates like a sales tax in that the charge is imposed on the customer and collected by the carrier. The statute says that “[e]ach telecommunications service provider shall include in its tariffs filed at the public service board a description of its billing procedures for the universal service fund charge.”¹ The Board has issued an opinion that prescribes the manner in which VUSF charges may appear. That opinion included the following text, which applies to all telecommunications service providers, wireline and wireless alike:

§ 405. ILLUSTRATION ON CUSTOMER BILL

- a. Telecommunications service providers may show the USF charge on a single line on the customer's bill. On a monthly bill, the USF Charge should be described in one of the following ways: "Vermont Universal Service Charge," "Vermont Universal Service Fund," "Vermont USF Charge," or the "Vt. USF Charge."

This same guidance is included in the contents of a draft administrative rule currently being considered for adoption by the Public Service Board. Preemption might intrude needlessly on this legitimate regulation of a program that was authorized, and is closely controlled, by the Vermont General Assembly.

4. 30 V.S.A. § 7521(a).

Third, all Vermont utilities pay a gross receipts tax to support the activities of the Vermont Public Service Board and Vermont Department of Public Service. For telecommunications companies, the rate is one-half percent of gross operating revenue, or \$500, whichever is greater.¹ Historically, the Public Service Board has required utilities not to separately state this charge on customer bills. In a Board decision issued in 1991, the Board adopted a recommendation of a Hearing Officer which stated:

The gross receipts tax is an element of each company's overall cost of service. Unlike the sales tax, which is a tax on a transaction and is therefore separately itemized, taxes contributing to general cost of service are not itemized on customer statements. This decision is consistent with general business practice; other elements of cost of service, such as the cost of capital or labor, are similarly not itemized on customer statements, but instead included as part of the overall cost of service.¹

The Board ordered that the utilities involved treat the tax as an "embedded" tax that is not itemized as a line item on customer bills. This is consistent with the Board's treatment of the same tax for other utilities.

We do not know the precise scope of preemption being considered. We would urge the Commission, however, to temper its desire for uniformity in wireless billing with the knowledge that states have legitimate authority to impose taxes on commerce and to regulate how those taxes are described to customers. Consumers also have a right to understand the components of their bills, including all state charges.

5. 30 V.S.A. § 22(a)(2).

6. *Petition of the Department of Public Service for a declaratory ruling concerning the applicability of 30 V.S.A. Section 22 to cable television companies in re: gross operating revenue tax assessment*, Public Service Board Docket No. 5464, 1991 WL 736274 (Vt.P.S.B.), Order of March 8, 1991.

In conclusion, we urge the Commission to refrain from preempting state commissions from regulating the terms and conditions of commercial mobile services, including customer billing information and practices.

Sincerely,

s/ James Volz,
Chairman

s/ David Coen
Commissioner

s/ John Burke
Commissioner